United Nations **AT**

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 968

Case No. 1074: ABDUL RAHIM

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Chittharanjan Felix Amerasinghe; Ms. Marsha A. Echols;

Whereas at the request of Iffat Fu'ad Abdul Rahim, a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, successively extended to 28 February, 31 October 1998 and 30 April 1999 the time-limit for the filing of an application to the Tribunal;

Whereas, on 3 April 1999, the Applicant filed an application containing pleas which read as follows:

"**SECTION II. PLEAS**

Applicant prays the Tribunal to order the following:

i. That [the] Respondent should consider her re-engagement with the Agency a status of reinstatement, including maintaining her previous seniority in grade and step, since the date of her reappointment.

ii. That [the] Respondent should recognize her twenty-five [years of service] before reappointment, qualifying for termination indemnity.

iii. [That she should be paid] counseling fees and secretarial expenses estimated at US $ 500."

Whereas the Respondent filed his answer on 27 September 1999;

Whereas the Applicant filed written observations on 27 January 2000.

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA as an Area staff member, in the capacity of Teacher, Grade 5, at the Beisan School, Hama, North Area, Syrian Arab Republic (SAR), on 4 September 1961. Effective close-of-business 30 September 1986, the Applicant resigned from the Agency's service.

On 26 March 1992, the Applicant wrote to the Director, UNRWA Affairs, SAR, requesting "reinstatement to service or payment of termination indemnity ..." On 26 April 1992, the Field Administration Officer (FAO), SAR, replied to the Applicant, that all benefits due to her had been paid when she resigned and her contractual relation with the Agency came to an end. Thus, she was not entitled to any further termination benefits. Regarding her request for re-employment, he told her that the Agency's policy on reappointment was subject to the standards governing recruitment, as set out in the Area Staff Regulations and Rules. He also advised her that, since she had left the Agency more than three years ago, she would not be given priority consideration, but be viewed as an external candidate.

On 19 July 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the decision not to re-employ her. On 29 March 1993, the JAB concluded that it had no jurisdiction to entertain her appeal, "because at the material time of the application, the Applicant did not enjoy the status of a staff member of the Agency", and recommended to declare the appeal non-receivable. The Commissioner-General informed the Applicant on 13 March 1993, that he had accepted the JAB's recommendation.

On 23 June 1993, the Applicant appealed to the United Nations Administrative Tribunal. In its Judgement No. 684, of 11 November 1994, the Tribunal ordered that the Applicant be accorded

priority consideration for the teaching posts in UNRWA for which she applied and was qualified, and if she was not appointed within nine months from the date of the judgement, she would be paid 12 months net base salary at the rate in effect at the time of resignation, as compensation.

On 25 March 1995, the Applicant appealed to the Director, UNRWA Affairs, to waive the condition of repayment of her provident fund benefits before reinstating her, to reinstate her to her former seniority in grade and step, and to consider the past years of her service as qualifying for termination indemnity.

On 26 March 1995, the Field Personnel Officer, SAR, advised the Applicant, that, pursuant to the Tribunal judgement in her case, it had been decided to re-employ her as a teacher at the Mathar School, Damascus, with effect from 1 April 1995. He enclosed two "option forms", giving her a choice to request reinstatement or reappointment.

On 18 April 1995, the FAO replied to the Applicant's letter of 25 March, advising her that he was unable to accede to her request. He drew her attention to Personnel Directive A/4/Part VI/Rev.5, which stipulates in paragraph 1.2 that "reinstatement of a staff member to his/her grade level reached at the time of his/her resignation and recognition of his/her prior service is conditional upon the staff member's repaying to the Agency all amounts received at the time of resignation". Since she was unable to repay the amounts received at the time of her resignation, her re-employment had to be by reappointment according to the Respondent. A Personnel Action form to that effect was issued recording her entry on duty as from 1 April 1995.

On 16 May 1995, the Applicant again lodged an appeal with the JAB.

On 19 March 1996, the Applicant wrote to the Field Personnel Officer requesting that her appointment status be converted to reinstatement and indicating that she would repay her separation benefits, at the latest in April 1996. On 31 March 1996, the last day on which she could do so, the Applicant filled out the required "option form", opting for reinstatement and indicating that she would repay the benefits in a lump sum, by the date of reinstatement.

On 9 April 1996, the Applicant wrote to the Field Personnel Officer requesting postponement of the conversion to reinstatement for an indefinite period, since she had failed to raise the required amount of money to refund the Agency.

On 15 April 1996, the Applicant was advised that her failure to meet the 31 March 1996 deadline for reinstatement rendered her request null and void; that her request for early voluntary retirement, contingent on the acceptance and processing of her request for reinstatement, was invalid; and, that any future request for conversion of her reappointment to reinstatement would be dismissed forthwith.

The JAB submitted its report on 17 March 1997. Its evaluation, judgement and recommendation read, in part, as follows:

"**III. EVALUATION AND JUDGEMENT**

...

d) By reference to Part IV of Personnel Directive A/4/Rev.4/Amend.9 ...

...

(e) ... the Board is of the opinion that there are no rules stating that the Appellant cannot be reinstated to the grade and level reached at the time of her resignation unless she repays the Agency the amount received at the time of the resignation, also the Board could not understand why previous experience in the Appellant's case was considered only when repaying back the money, and if she repaid back the money would she have gained more experience than she already has.

IV. RECOMMENDATION

16. In view of the foregoing ..., the Board unanimously makes its recommendation that the administrative decision appealed against be reviewed, with a view of:

(1) Reinstating the Appellant to a post with the same grade level she reached at the time of her resignation.

(2) The Appellant's situation concerning the Provident Fund, and the separation benefits should be calculated on the basis of a new appointment."

On 22 June 1997, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"... Notwithstanding that you did not seek a review of the administrative decision prior to appealing to the Board as required by the Rules, the Board did not address the issue of the receivability of the appeal and considered only the merits of the appeal. The Board was of the opinion that there was no requirement in the rules Directive that you repay your separations benefits to be entitled to be reinstated into your post at the same grade and step level you had reached at the time of your resignation in 1986 and accordingly recommended that you be reinstated at that level. However, it apparently was of the opinion that you were not entitled to restoration of your previous qualifying service for the purpose of calculating your separation benefits.

On the merits, I believe that the Board is incorrect. Reinstatement is a term defined in Personnel Directive A/4. To be entitled to re-employment by way of reinstatement, a staff member must repay all separation benefits previously received. You failed to do so. Paragraph 4 of Part VI of the Personnel Directive makes it clear that re-employment at a previous grade and step level can only occur by way of reinstatement. More importantly, an appeal against an administrative decision is not receivable by the Board unless a staff member has first sought the review of the decision in accordance with the Rules. Unlike non-adherence to time limits, the Board cannot waive this mandatory procedural requirement and because you did not comply with the Rules and seek the review of the decision which you impugn, on that ground primarily, I have dismissed your appeal.

..."

On 3 April 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Area staff rules 109.9 (4), 109.2 (6) and other relevant rules did not envisage any restrictions on the recognition of services qualifying for termination indemnity other than those included in the text.

2. Part IV of Personnel Directive A/4, as amended on 1 July 1980, is inconsistent with the afore-mentioned Area staff rules, unlawful, and did not maintain the acquired rights of Area staff members, including the Applicant.

3. The contested decision is inconsistent with the Declaration of Human Rights. Furthermore, it enriched the Respondent without cause and simultaneously impoverished the Applicant.

Whereas the Respondent's principal contentions are:

1. The application is not receivable, as the Applicant did not seek administrative review of the contested decision.

2. The decision to refuse reinstatement of the Applicant unless separation benefits are reimbursed is in accordance with Judgement No. 684, and with the Staff Rules and the Agency's policy.

3. Personnel Directive A/4/Part VI/Rev.5 is lawful and consistent with the Area Staff Rules.

The Tribunal, having deliberated from 6 July to 3 August 2000, now pronounces the following judgement:

I. The Applicant, who was re-employed by the Respondent in 1995 pursuant to Judgement No. 684, seeks an order changing the nature of that re-employment. In essence the Applicant asks the Tribunal to order the Respondent to reinstate her, thereby recognizing her previous twenty-five years of service from 1961 until her resignation in 1986 and the seniority in grade and step she had achieved before her 1986 resignation. Such an order would have the effect of making the Applicant eligible for full termination benefits, in spite of the fact that she received in 1986 all separation payments (including Provident Fund benefits) due to her as a result of her service from 1961 to 1986.

For procedural reasons, the Tribunal rejects the requests of the Applicant.

II. This matter requires the Tribunal to consider the receivability of the application. Article 7 of the Statute of the Tribunal mandates that an application "shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations..." The joint appeals body provided for in the Staff Regulations is the JAB created by Area staff regulation 11.1 (Cod./A/59/Rev.25/Amend.28) of June 1991. In previous cases the Tribunal has refused to receive matters not previously submitted to the JAB. (Cf. Judgement No. 646, *Soltes* (1994), para. X).

III. In contrast, in this case the Applicant submitted her claim to the JAB, but without following Area staff rule 111.3 (1). That rule (like article 7 of the Tribunal's Statute) aims to ensure that a certain internal, administrative procedure has been followed before the matter is considered on appeal. Area staff rule 111.3 (1) requires that the staff member "shall as a first step, address a letter to the Agency's administration requesting that the administrative decision concerned ... be reviewed, and setting out his/her reasons for this request."

The Applicant, in describing the procedure followed by her, admits that the 18 April 1995 denial of her request was followed by a 6 May 1995 appeal to the JAB. This failure of the Applicant to abide by the mandatory procedure set forth in Area staff rule 111.3 (1) was raised by the Respondent before the JAB. Nevertheless, the JAB considered the matter on its merits and did not address the issue of receivability.

IV. The Agency's internal procedures include an initial request for review of the contested decision before an appeal to the JAB. This process allows the Agency to reconsider its decision and to amend or revise it. As stated in Judgement No. 905, *El-Far* (1998), para. III:

> "... administrative review is a very important internal procedure. It gives the Administration an opportunity to redress a grievance before it is taken any further... It is of the utmost importance that the Administration be given this opportunity, not only because it could result in avoidance of complicated and extended litigation but because it is only fair that the Administration be given the opportunity to reconsider and re-evaluate its decision before that decision is litigated. This is also the manner in which the process of settling grievances is generally structured in international administrative law."

V. In this matter, i..e., a matter heard by but not legally receivable by the JAB, the letter but not the intent of article 7 of the Statute has been followed.

The Tribunal considers that there are two possible interpretations of article 7.1. It may interpret the article so that any matter that has been submitted to the JAB is receivable, indicating that the legal concern of the Tribunal is only that the JAB has acted. In this event the Tribunal would not examine the legality of the procedures followed by the JAB. On the other hand, article 7.1 may be

interpreted to mean that internal administrative procedures, culminating in a recommendation by the JAB, must have been followed. In this event the Tribunal would underscore the importance of the established rules and procedures in all matters to be heard by this body and would thereby support the applicable rules of the Tribunal and the JAB.

VI. The Tribunal believes that it must require respect for internal Agency procedures, which the Applicant ignored. For this reason, article 7.1, read in conjunction with Area staff rule 111.3 (1), render this matter non-receivable.

VII. This matter is different from Judgement No. 916, *Douaji* (1999), in which the Respondent incorrectly assumed that the Applicant was challenging a decision taken four years prior to her appeal, when in fact she was challenging the Administration's inaction in relation to the implementation of that decision.

The Tribunal found in *Douaji* that the Applicant was entitled to lodge an appeal with the JAB and remanded the case to the JAB for consideration on the merits. However, in that case it was the JAB, not the Applicant, which had failed to follow the appropriate internal procedures, since it had refused to accept and respond to the Applicant's submission. Those are not the circumstances presented in this case.

This case is also different from *El-Far*, in which there had been no JAB consideration of the case. There the Respondent had made certain representations to the Applicant, which the Tribunal found precluded the Respondent from arguing that the Applicant had failed to request an administrative review.

VIII. For the foregoing reasons, the Tribunal rejects the application in its entirety, including the request for the payment of counseling fees and secretarial expenses.

(Signatures)

Hubert THIERRY
President

Chittharanjan Felix AMERASINGHE
Member

Marsha A. ECHOLS
Member

Geneva, 3 August 2000

Maritza STRUYVENBERG
Executive Secretary